

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

MICHAEL ARTHUR McGIFFIN, §
§
Plaintiff, §
§
v. § CIVIL ACTION NO. V-05-019
§
NANCY POMYKAL, et al., §
§
Defendants. §

ORDER

This civil rights action, filed under 42 U.S.C. § 1983, was dismissed pursuant to the plaintiff's motion. The plaintiff has since filed a Motion for Leave to Refile an Out of Time Civil Rights Complaint. Docket Entry No. 18. The plaintiff contends that he was misinformed by an attorney on how to amend his complaint and that he had been advised that the period of limitations would be tolled while he was in jail. He further claims that there was some delay before he received notice of his dismissal.

The plaintiff's Original Complaint (Docket Entry No. 1) alleges events that occurred in January 2003. The plaintiff's motion to dismiss was filed after January of 2005. “A voluntary dismissal without prejudice leaves the situation as if the action had never been filed. After a dismissal the action is no longer pending in the court and no further proceedings in the action are proper.” *Long v. Bureau of Pardons and Paroles of Texas*, 725 F.2d 306, 307 (5th Cir.1984). Moreover, the claims allegations presented in the Original Complaint concern the charges brought against the plaintiff and the subsequent trial in which he was found guilty and sentenced to prison. *See* Docket Entry No. 1. Such claims cannot be brought in a section 1983 complaint. *Heck v.*

Humphrey, 114 S.Ct. 2364, 2372 (1994). The fact that the plaintiff may have been misinformed by an attorney regarding the prosecution of his civil rights case does not warrant relief because there is no constitutional or statutory right to effective assistance of counsel in such proceedings. *Watson v. Moss*, 619 F.2d 775 (8th Cir. 1980). Therefore, the court will deny the plaintiff's motion because the prior dismissal has completely terminated the litigation. *See Perkins v. Johnson*, 118 Fed.Appx. 824, 285 (5th Cir. 2004), *citing Long*, at 306.

The plaintiff's Motion to Refile (Docket Entry No. 18) is **DENIED**.

SIGNED on this 11th day of September, 2007.


JOHN D. RAINY
UNITED STATES DISTRICT JUDGE